No. 341.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

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ANTOINETTE THORMANN, PLAINTIFF IN ERROR,

vs.

ANDREW J. FRAME AND MAGDALENA FABACHER AND JACOB FABACHER, MINORS, BY D. S. TULLAR, THEIR GUARDIAN AD LITEM.

IN ERROR TO THE CIRCUIT COURT OF THE COUNTY OF WAUKESHA, STATE OF WISCONSIN.

BRIEF IN OPPOSITION TO THE MOTIONS TO DISMISS OR AFFIRM.

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WASHINGTON, D. C., 1505 PA. AVE., *January* 20, 1900.

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IN ERROR TO THE CIRCUIT COURT OF THE COUNTY OF WAUKESHA, STATE OF WISCONSIN.

Brief in Opposition to the Motions to Dismiss or Affirm.

It is respectfully submitted that neither the motion to dismiss this writ of error, nor, that failing, the motion to affirm the judgment below should prevail.

On the contrary, we submit that, as the motion to dismiss involves the sole question presented by the writ of error, and

as the law of that question appears to be with the plaintiff in error, the judgment of the Supreme Court of the State of Wisconsin should be reversed, and the case remanded for a new trial.

STATEMENT.

This is a petition, in probate, filed in the County Court of Waukesha County, on March 27, 1897, by Andrew J. Frame, one of the defendants in error.

It sets up that Joseph Fabacher died at New Orleans, on March 3, 1897; that he was, at the time of his death, an "inhabitant" of the County of Waukesha; that he left personal estate amounting to $65,000, and real estate, in Wisconsin, yielding an annual sum not exceeding $2,500; that he left him surviving a widow, Magdalena Fabacher, and eleven children, his next of kin and heirs-at-law, namely, Lawrence, Joseph H., Albert, Anthony, Louis, Peter, John J., Barbara Bradrich, Alis Fabacher, Magdalena Fabacher, and Jacob Fabacher, all of full age except the last two, Magdalena and Jacob, who are minors, and Johannes Fabacher, a brother and legatee; that the deceased left a will, duly executed, whereof Petitioner is named Executor; and praying that the will may be admitted to probate and letters testamentary issued to petitioner. (Rec., 1.)

On the same day, D. S. Tullar was appointed guardian *ad litem* of the two minors, (Rec., 3,) and publication ordered, notifying "all persons interested in said estate" that there would be a hearing on the petition at a regular term of the Court to be held on the first Tuesday of May, 1897. (Rec., 2.)

On May 4, 1897, the plaintiff in error, Antoinette Thor-

mann, of New Orleans, La., appeared, by counsel, and objected to the probate of the alleged will, on the following grounds:

I. That the Court was without jurisdiction to allow probate, the testator having had, continuously, his domicil and residence in the City of New Orleans, from 1843 until his death.

II. That any attempt of deceased to acquire or create a fictitious domicil, inhabitancy, or residence in the City of Waukesha, Wisconsin, "was made with a fraudulent purpose and intent of depriving the said contestant, Antoinette Thormann, of her legitimate and hereditary rights as the sole heir-at-law of said deceased, under the statutes of descent of the State of Louisiana."

III. That the execution of the will was procured by undue influence, exercised by the beneficiaries under the will, and, especially, by testator's widow.

IV. That the will was not executed in the manner and form required by law. (Rec., 5, 6.)

The issues, thus raised, came on for trial. Much testimony was taken, and much documentary evidence adduced, and on September 1, 1897, the said County Court admitted the will to probate, finding as a fact, *inter alia*, that the testator had his domicil in Waukesha County, and issued letters testamentary to the Executor. (Rec., 8, 9. See Opinion of Court, pp. 32–56.)

Thereupon, the Plaintiff in Error appealed to the Circuit

Court of Waukesha County (Rec., 13–16), where all the issues tried before the County Judge were tried, *de novo*, before a jury.

After hearing a great deal of testimony, the jury found upon several specific issues submitted to them by the Court, and, amongst others, on the issue as to the true domicil of the testator at the time of his death, the finding on that issue being that the domicil of the testator, at the said time, was the City of Waukesha. The findings on the other issues being also in favor of the proponent of the will (Rec., 20, 21), and the Court concurring in said findings, judgment went accordingly (Rec., 24–26), the judgment of the County Court being, in all things, affirmed. (Rec., 21–26.)

From the judgment of the Circuit Court of Waukesha County the plaintiff in error duly appealed to the Supreme Court of the State. (Rec., 29, 32.)

On April 25, 1899, the State Supreme Court affirmed the judgment of the Circuit Court. (Rec., 33.)

To review that judgment a writ of error was, upon due allowance, sued out of this Court, by Antoinette Thormann, the plaintiff in error (Rec., 551,) and the case is now here.

Is there a federal question to support this writ of error?

The writ was allowed by the Chief Justice of the Supreme Court of Wisconsin.

In her petition for the writ, the petitioner avers that, in this cause, she has claimed "rights, privileges and immunities arising under the Constitution and laws of the United States," and that the judgment of the said Supreme Court is

adverse to the same; that there was drawn in question the validity of an authority exercised under the United States, and that the decision of the said Supreme Court is against its validity; that the said Supreme Court has failed to give full faith and credit to a certain judgment rendered by the civil district court for the parish of Orleans, Division "B," State of Louisiana, in the matter of the succession of Joseph Fabacher, No. 52,941 of the docket of said court, appointing petitioner administratrix of his said succession, as required by the Constitution of the United States; and that the said Supreme Court failed to give the same faith and credit to said proceedings had in the said civil district court for the Parish of Orleans, State of Louisiana, in this cause as said judgment has in the courts of the State of Louisiana, from which said record was taken. (Rec., 552, 553.)

Accompanying, and filed with, her petition for the writ, are eleven assignments of error, based on the grounds presented in the petition, (Rec., 554–556,) and which may be more particularly referred to in the progress of the argument.

The issue on which the case turned in the State courts was, as to the domicil of the decedent, Joseph Fabacher, at the time of his death.

The contestant, the plaintiff in error, to maintain the issue on her part joined, introduced, amongst other evidence, the record of the judgment of the civil district court of the parish of Orleans, Louisiana, appointing Antoinette Thormann, the plaintiff in error, administratrix of the succession of Joseph Fabacher, as *conclusively* establishing (1) that the decedent was domiciled in New Orleans, in the Parish of Orleans, at the time of his death, and (2), as a necessary

consequence, that the County Court of Waukesha, Wisconsin, had no jurisdiction of the probate of the decedent's will. But the Supreme Court of the State, treating the question of domicil as at large, denied such effect to the said judgment, holding that the true domicil of the decedent, at the time of his death, was Waukesha, and, consequently, that the County Court of the County of Waukesha had jurisdiction of the probate of said will. (Rec., 566–569.)

If now this ruling was, as we contend, a refusal to give "full faith and credit" to the judgment of the civil district court of the parish of Orleans, in the particulars mentioned, all the proceedings below were *coram non judice*. From which it follows, that it is *indispensable* to the correct decision of the case, *in any of its aspects*, that the question thus raised under the Constitution of the United States should be decided by this Court.

Did the Supreme Court of Wisconsin refuse to give "full faith and credit" to the judgment of the Louisiana Court?

This question involves an inquiry into the scope and effect of the judgment of the civil district Court of the Parish of Orleans appointing Antoinette Thormann, plaintiff in error, administratrix of the succession of Joseph Fabacher, deceased. (Rec., 136, 501.)

According to the law of Louisiana, it was indispensable to the validity of the judgment that three averments made in the petition (Rec., 138, 503, 504) should be established to the satisfaction of the Court; namely, (1) that Joseph Fabacher, deceased, was domiciled in the Parish of Orleans at the time

of his death; (2) that the petitioner was the sole surviving heir of the deceased; and (3) that the deceased died intestate.

Notice of the application was given according to law, (Rec., 136, 140; and Rev. C. C., arts. 1114–1120,) and an attorney and counsellor at law appointed "to represent the absent heirs." (Rec., 140.)

And if the existence of assets in the State of Louisiana was necessary to give jurisdiction in the premises, there was such property, to wit, one marble tomb,* two galvanized iron sofas, and five vases of the appraised value of $3,500. An attempt was made to inventory divers household effects, which, however, the alleged widow of the deceased, upon interrogation, claimed as her own property. (Inventory, Rec., 135.)

It will thus be noted, that the alleged widow was brought in direct contact with the opening of the succession of the deceased in the parish of Orleans.

Afterwards, she actually intervened in that proceeding to protect said household effects from sequestration and removal at the suit of plaintiff in error. (Rec., 180–194, 505–507.)

In addition, at the time the application of plaintiff in error was pending in New Orleans the widow of the deceased and all his children named as legatees were living in New Orleans, except one who was living elsewhere in the State of Louisiana. (Dep. Antoinette Thormann, Rec., 227; dep. Pauline Gross, Rec., 144; Inventory, Rec., 135.)

All of these parties had notice, therefore, of the applica-

*There may be property in a tomb. (*Choppin vs. Dauphin*, 48 A., 121; *Barker vs. Wall*, 29 A., 38; *McEnery vs. Pargoud*, 10 A., 497.)

tion, in the manner prescribed by the law of Louisiana, and upon that ground alone are bound by the judgment on the application. And as to the heir and annuitant, the testator's brother, Johannes Fabacher, who resides in France, he was fully represented by the attorney and counsellor at law appointed by the civil district court to represent "the absent heirs." (Rec., 140; Rev. Civ. C., Arts. 1210–1219.)

Such representation by counsel is not merely nominal, but, as the code shows, (*supra*,) serious and substantial.

The judgment of the Louisiana Court may, therefore, be said to be as well *inter partes* as *in rem*.

Indubitably, the judgment of that Court is conclusive as to the domicil of the decedent, the right of the petitioner to have administration of the succession, and the intestacy of the decedent, the determination of these questions being fundamental to it, whether a precise issue was taken on any one of them or not. (2 Black, Judg., § 614, *and cases cited in note* 547.)

Said the Supreme Court of Massachusetts, in *Burton vs. Shannon*, (99 Mass., 200:)

> The estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable. (Quoted in 2 Black, Judg., § 613.)

That the Louisiana judgment has the conclusive effect contended for, in the particulars mentioned, is established by overwhelming authority. Indeed, this Court, in *Simmons vs. Saul* (138 U. S., 439, 451), held that a grant of administration by a parish Court of Louisiana, the averments

necessary to the jurisdiction of the Court appearing on the face of the proceedings, could not be collaterally assailed on the ground of the non-existence of material facts necessary to support the judgment, the judgment being held to be *conclusive* as to the existence of such facts.

In *Garrett et al. vs. Boeing et al.* (15 C. C. A., 209; S. C., 68 Fed. Rep., 51) it was held that the judgment of a parish Court, in Louisiana, granting administration could not be attacked, collaterally, on the ground that the decedent died in another parish, the judgment being held to be conclusive on the point of residence. To the same effect are the cases of *Holmes vs. Oregon and Cal. R. R. Co.* (5 Fed. Rep., 523; S. C., 9 Fed. Rep., 229), *Va. and Ga. R'y Co. vs. Mahmey* (89 Tenn., 311), *Eller vs. Richardson* (89 Tenn., 575), *Dusen vs. Dupré* (32 A., 896), *Gravenburg vs. Bradford* (44 A., 418), *Vinet, Ex'or, vs. Bros and Richardson* (48 A., 1254). In *Franklin vs. Franklin* (91 Tenn., 119) it was held, that a grant of administration was, upon collateral attack, conclusive on the fact of the decedent's intestacy.

Undoubtedly, the judgment of the Louisiana Court is conclusive, in that State, as to the domicil and intestacy of the decedent, and the heirship of plaintiff in error, but that judgment has a more extended scope than a judgment *inter partes*, for it is conclusive on all the world, the suit in which it was rendered being essentially a proceeding *in rem*.

One of its objects was to fix the *status* of the decedent's estate wherever it might be situated, for all his movable property must necessarily be distributed in obedience to the law of his domicil at the time of his death. It was, therefore, of prime importance that his succession should be opened at the place of his domicil. Otherwise there would

be no ascertained law or rule for the distribution of his movable property, or the determination of the validity of any testamentary act relating thereto.

This is in complete harmony with the doctrine of ancillary administration and of the restriction of each administration to the assets situate within the jurisdiction creating it.

Hence a grant of probate or of administration is not to be questioned anywhere but in the Court that made it. (*McFarland vs. Stone*, 17 Vt., 165; *Lawrence vs. Englesby*, 24 Vt., 42; *Naylor vs. Moffatt*, 29 Mo., 126; *Savage vs. Benham*, 17 Ala., 119.)

As a grant of probate of a will determines the *status* of the instrument and the estate it operates upon (Black Judg., § 638, *and cases cited*), so does a grant of domiciliary administration fix the *status* of the decedent's succession (*ibid.*, § 639, *and cases cited*). Both proceedings being essentially *in rem* must stand until reversed by a direct proceeding impeaching their validity, as by an appeal, or, in Louisiana, by the action of nullity.

Although present, in New Orleans, at the time the opening of the succession of Joseph Fabacher took place, none of the legatees under the will filed an opposition thereto. Indeed, the alleged widow did in fact, as we have seen, intervene *for another purpose*, namely, to oppose the claim of the plaintiff in error, as administratrix, to certain household effects as the property of Fabacher's succession.

It is to such proceedings, no doubt, that this Court had reference, in *Pennoyer vs. Neff* (95 U. S., 727), when it said, that substituted service by publication against non-residents is permissible "*in all actions which are substantially proceedings in rem.*"

The judgment of the Wisconsin Court that Joseph Fabacher was domiciled in Waukesha, cannot control, because *posterior in date* to the Louisiana judgment. The former judgment having been rendered on September 1, 1897 (Rec., 8, 9), and the latter, on April 30, 1897, (Rec., 133), the latter judgment, being prior in time, must prevail. (*Stout vs. Lye*, 103 U. S., 66; *Rogers vs. Odell*, 39 N. H., 417; *Low vs. Mussey*, 41 Vt., 393; *Peak vs. Sviger*, 10 Yerg., 469.)

It follows, therefore, that the collateral attack on the Louisiana judgment made by the Supreme Court of Wisconsin was without warrant in law.

If now the force and effect of the Louisiana judgment is such as we have said, can we doubt, for a moment, that the Supreme Court of Wisconsin refused, in its judgment, to give that force and effect to the Louisiana judgment?

That refusal was, clearly, the denial of a right set up and claimed by the plaintiff in error under the Constitution of the United States. (*Green vs. Van Buskirk*, 5 Wall., 307; S. C., 7 Wall., 139; *Huntington vs. Attrill*, 146 U. S., 657, 666, *and cases therein cited.*)

If now it sufficiently appears, that the right claimed by plaintiff in error under the Constitution was duly set up and insisted upon in the Supreme Court of Wisconsin, and denied by that Court, the jurisdiction of this Court over this writ of error would seem to be complete.

That the federal right was duly set up and insisted on in the State Supreme Court, appears in the opinion of that Court. By the law of Wisconsin, it is required that the opinions of the Supreme Court of the State shall be filed, and "shall constitute and be held a part of the record, and shall be certified to any court of the United States to which

such record may be removed." (Rev. Stat. of Wisconsin, 1898, Sec. 2410, p. 1740, by Sandborn & Berryman.) So that in that State, as in Louisiana, the opinions of its Supreme Court *form a part of the record* in cases determined by it.

It is apparent, therefore, that even under Section 25, of the Judiciary Act of 1789, requiring that the federal question should appear "on the face of the record," this Court could have examined the opinion of the State Court, in a case like this, for the purpose of discovering whether a federal question was involved in the judgment below.

Since the repeal of that part of Section 25 referred to, this Court has not hesitated to examine the opinions of State Courts for the purpose mentioned, when properly authenticated. (*Murdock vs. Memphis*, 20 Wall., 590; *Cropley vs. New Orleans*, 108 U. S., 105; *Gross vs. U. S. Mtge. Co.*, 108 U. S., 477; *Phil. Fire Ass. vs. New York*, 119 U. S., 110; *Egan vs. Hart*, 165 U. S., 188.)

Answer to Brief on the Motion to Dismiss.

It is of no concern to this Court, how the proceedings of the County and Circuit Courts of Waukesha County, in this case, were conducted, or whether the Louisiana judgment was relied on as an estoppel in those proceedings or not, or whether the matter of estoppel should have been specially pleaded or insisted upon. All such inquiries are irrelevant and out of place; the single inquiry admissible, *at any time*, on this writ of error being, in the language of the statute which shapes the jurisdiction of this Court, whether there is "any right claimed under the Constitution," "in any suit in the *highest court* of a State,

in which a decision in the suit could be had," "and the decision is against the * * * right" (R. S., § 709); in other words, whether any such right was set up by the plaintiff in error, in this case, in the Supreme Court of Wisconsin, and decided adversely to the right by that Court.

But the question how the claim under the Constitution was brought before that Court is one of State law, with which this Court will not intermeddle, it being sufficient to attract the jurisdiction of this Court, that such a question was before the State Court, and so decided there.

But the point taken is not correct, for this Court has held that a former judgment may be introduced in evidence as an estoppel without having been specially pleaded. (*Wash., &c., Packet Co. vs. Sickles et al.*, 24 How., 333; *Southern Pacific Co. vs. United States*, 168 U. S., 1; *Caujolle vs. Ferrié*, 13 Wall., 465.)

It is, also, insisted that the plaintiff in error is estopped to raise the federal question, because, as alleged, she did not insist upon the Louisiana judgment, as conclusive of the matter of domicil, in the County and Circuit Courts of Waukesha County.

But the obvious reply to this position is, that the matter of estoppel is one of *State law*. If, indeed, the State Supreme Court had decided that under the State law, plaintiff in error had lost her right to raise the federal question in that court, the case would then have been analogous to the case of *Eustis vs. Bolles* (150 U. S., 361), where the State Court ruled that the plaintiff in error, who had received money in a proceeding under a State insolvent law, was estopped to assail the constitutionality of that law.

If, however, in that case, the State Supreme Court had passed by the question of estoppel, and decided the case on the federal question alone, could this Court have declined jurisdiction upon the ground of an estoppel based on *State law*, and not noticed by the State Court?

Can this Court, therefore, say to the Supreme Court of Wisconsin that, in denying the federal right claimed by plaintiff in error, it determined a question not properly before it by the State procedure, when properly understood? Surely, this Court has never committed any such invasion of State supremacy, and, it may be safely said, *never will*.

In the face of the fact, that the federal right, now insisted on, is *jurisdictional and permeates the whole case, and must needs have been passed on by the State Supreme Court*, the extraordinary pretension is advanced, that the decision of the right was not necessary to the proper determination of the case, as if the first inquiry of every court was not, whether the matter presented to it for decision is within the circle of its powers.

In the case at bar, all the proceedings in the several State Courts were *coram non judice*, if our contention as to the effect of the Louisiana judgment is correct. The federal question raised is, therefore, of such a character that "*the judgment as rendered could not have been given without deciding it*," to borrow the language of the court in *Eustis vs. Bolles*. (*Supra.*)

The *only* practical issue relevant to the case is that involving the domicil of the decedent, and that issue necessarily includes the question of estoppel based on the Louisiana judgment, which dominates the case.

To cite authorities in support of these elementary principles is unnecessary, because they are ever present to the Court.

But it is said, in Mr. Tullar's brief (p. 3), that this Court has held that it will not notice a federal question which was not the subject of a substantial contention in the Court of first instance and the case of *Cornell vs. Green* (163 U. S., 80) is vouched, in support of the proposition.

That case, however, has no relevancy to the discussion, because it was an appeal from a federal Circuit Court, under the act of March 3, 1891, whereas the case at bar is a writ of error under Section 709, Revised Statutes, which authorizes this Court to review any final judgment or decree of the Supreme Court of a State, *which judgment or decree denies a federal right* claimed by the plaintiff in error. It is, therefore, where the Supreme Court of a State has denied the federal right, that the reviewing power of this Court is called into activity, it being a matter of indifference what the inferior State Courts may have done in the premises. Plainly, then, the case relied on does not hit the point in this case, and requires no further attention.

It may be confidently stated that the four propositions relied on in the brief for the executors and legatees (p. 12), in support of the motion to dismiss, are without merit, for (1) the federal question *does appear in the record*, (2) that question *was decided* by the State Court, (3) the decision of the federal question *was necessary*, and (4) the judgment of the State Court *does not rest on any independent ground of State jurisprudence* capable of supporting it.

It follows, therefore, that the motion to dismiss must be *denied*.

The Motion to Affirm.

This motion is allowable only where it is "*manifest*" that the writ was sued out "for delay only," or "that the question on which the jurisdiction depends is so frivolous as not to need further argument."

There is no conceivable ground to support the contention that the writ was sued out "for delay only," and no attempt is made to show the existence of any such ground.

It must, therefore, be on the other ground that the motion rests.

But if the question involved is "so frivolous as not to need further argument," it is certainly not easy to perceive why so elaborate an argument and so much research have been employed to establish the frivolousness of the question.

The truth is, that the argument on the proposition is a *felo de se*, showing, conclusively, the very opposite of what it was intended to support.

The injustice of allowing the motion is apparent, for to allow it would deprive the plaintiff in error of her right to a discussion of the case at the bar, in the usual way, which was not the intention of the rule.

Here the discussion should close, and would close, but for the misleading character of the argument in favor of the motion to affirm, which we are not disposed to let pass, without a brief refutation.

The principle does not seem to strike the learned counsel opposite, that while there may be an administration in every State where the decedent left assets, there can be but *one domiciliary administration*, and that any contest as to the validity of an administration claiming to be such *must be carried on in the*

court that granted it, and not by setting up a rival administration in some other jurisdiction. This is admitted to be the rule in the case of the probate of a will, why then should it not be the rule in the case of an administration determining the *status* of the decedent's estate, wherever it may be?

The position taken, that the averment of Fabacher's domicil in the petition of plaintiff in error, in the Louisiana proceeding to open Fabacher's succession, was not jurisdictional and not established by the judgment in that proceeding cannot be sustained.

To say that a judgment does not involve a final determination of every matter *in pais* necessary to give the Court jurisdiction, seems like a solecism, and is irreconcilable with the solemn determinations of this Court. (*Grignon's Lessee vs. Astor*, 2 How., 338; *Florentine vs. Barton*, 2 Wall., 212; *Noble vs. Union River Logging R. Co.*, 147 U. S., 165.)

These authorities establish a principle of general jurisprudence which this Court will apply and enforce without regard to the decisions of any State, to the contrary, if there be such.

To sustain their proposition that the Louisiana judgment is not conclusive on the point of Fabacher's domicil, counsel opposite cite, with an air of triumph, the cases of *Beckett vs. Selover* (7 Cal., 233) and *The Succession of Williamson* (3 A., 261), the former of which was OVERRULED in *Irwin vs. Scriber* (18 Cal., 499) and the latter in *Duson vs. Dupré* (32 A., 896, 898). In the latter case, an attempt was made to overturn an administration by a side-wind attack, on the ground that the decedent's domicil, at the time of his death, was the parish of Orleans, and consequently that the open-

ing of his succession in the parish of St. Landry was void: but the Court repudiated the contention, saying:

> No principle of our jurisprudence is more firmly established than the following: Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceeding on which they issued cannot be examined collaterally.

It is hardly permissible to follow further the irregular discussion of the other side, on the motion to affirm. We are much tempted, however, to enter upon a vindication of the appositeness of the cases we have cited, against the criticisms of opposite counsel, but, under the circumstances, have concluded to let those cases speak for themselves.

Clearly, then, the motion to affirm should be denied.

In the interest of good morals and sound policy, it is to be hoped, that the jurisprudence of the case will justify the reversal of the judgment.

If the judgment is permitted to stand, then will be ensured the consummation of that unholy scheme to deprive Mrs. Thormann, the forced heir, and only living legitimate offspring of Joseph Fabacher, of all participation in his estate, and bestow it upon his concubine and her bastard progeny, that concubine being *his own wife's sister*. If the judgment should be reversed that unclean purpose would be frustrated, for the law of Louisiana strikes with nullity the instrumentality to effectuate it.

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Washington, D. C., 1505 Pa. Ave., *January* 20, 1900.